United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7158

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To be argued by
JOSEPH ARTHUR COHEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

KATHLEEN G. O'GEE,
Plaintiff-Appellee,

—against—

DOBBS HOUSES, INC.,
Defendant and Third Party Plaintiff-Appellant,

—against—

UNITED AIR LINES, INC.,
Third Party Defendant-Appellee.

P/S

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT, DOBBS HOUSES, INC.

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Defendant and Third Party Plaintiff-Appellant, Dobbs Houses, Inc.
801 Second Avenue
New York, N.Y. 10017
(212) 986-9505

SIDNEY A. SCHWARTZ
JOSEPH ARTHUR COHEN
Of Counsel

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT, DOBBS HOUSES, INC.

The Issues on Appeal

The issues respectfully submitted to this Court for its consideration by defendant-appellant, Dobbs Houses, Inc. (hereinafter "Dobbs") are as follows:

1. That plaintiff did not establish a *prima facie* case of actionable negligence on the part of Dobbs.

2. That plaintiff offered no competent proof to causally relate the slipped disc and laminectomy performed on May 18, 1973 to the alleged incident of April 23, 1972. As a corollary issue, it was highly prejudicial to Dobbs to allow plaintiff to introduce hearsay within hearsay on this key issue.

3. That the undisputed proof was that there was no emergency in existence at the time of the alleged incident, and hence it was error for the Trial Judge to charge the jury on the "emergency doctrine."

4. That the damage award of $170,000 was excessive and not supported by proof in the record.

5. That the verdict in favor of United and against Dobbs was contrary to the weight of the evidence.

The Nature of the Case

Plaintiff brings this action to recover damages for personal injuries allegedly sustained by her in an incident that occurred on April 23, 1972 at which time she was a stewardess in the employ of United Air Lines, Inc. (hereinafter "United") aboard a Stretch 727 which had just taken off from Atlanta Airport. The essence of her claim is that after take-off she noticed that a cold food buffet in the forward galley had slid 2 feet out of place and that when she tried to push it back into place she felt a twinge in her back. She claims that such buffet had been put aboard the plane in Atlanta by Dobbs, an airline caterer, and that Dobbs failed to lock it into place and is hence legally liable for the subsequent incident.

On May 18, 1973 plaintiff underwent a laminectomy for a slipped disc. Neither the doctor who performed such operation at the Genessee Hospital in Rochester, New

York, nor any of the many doctors that she had seen between the date of the alleged incident, April 23, 1972, and the time of the operation, May 18, 1973, were called by her as witnesses on trial. Indeed, her only medical witness on trial was a Dr. Koven who saw her for the first time in December of 1976 at the request of her attorney.

Dr. Koven was allowed to testify, over objection by Dobbs, to what the plaintiff told him various doctors had said to her during this critical period of time between the alleged incident and the laminectomy. The only actual medical proof of her condition during that period of time was produced by Dobbs who called Dr. Kapland who testified about his examination of plaintiff in July of 1972, and the documentary proof of her physical examination by her employer, United, in September of 1972 before she was allowed to return to work. It is undisputed that that evidence shows that she did not have a herniated disc at that time; and whatever may have occurred to her thereafter is something for which Dobbs cannot be liable herein.

The buffet and its tracking and locking system were all equipment belonging to and maintained by United, who had hired Dobbs to do the catering at the Atlanta Airport. In view of the judicial admissions made by United that such buffets were supposed to *automatically* lock into place once they were pushed into position, Dobbs impleaded United for indemnity or contribution on the basis that if the buffet came loose during take-off it was due to some problem in the equipment which would be the legal responsibility of United.

The Course of Proceedings and Disposition in the Court Below

This action came on for trial before the Hon. Jack B. Weinstein and a jury on March 3, 1977. It terminated on March 10, 1977 with a special verdict finding Dobbs to be solely at fault and awarding plaintiff damages in the amount of $170,000 (511a).*

Statement of Relevant Facts

(a) *On the issue of whether a prima facie case of actionable negligence was established.* On April 23, 1972 plaintiff was a stewardess in the employ of United and was working aboard a flight going from Atlanta to New York City (8a-9a). Before the plane took off from Atlanta, food was loaded aboard it by employees of Dobbs who is an airline caterer at various airports and who had a contract with United to do such catering at Atlanta (613a-617a). The essence of the plaintiff's action is her claim that when the cold food buffet in the forward galley was placed aboard by two unidentified employees of Dobbs, they failed to manually lock it in place. However, the record is completely devoid of proof that the cold food buffet was not manually locked in place as plaintiff claims. Indeed, one of the issues in this case is whether even if there were any such failure, the same could constitute actionable negligence towards the plaintiff.

The cold food buffet is a four drawer compartment that is brought aboard the plane on dollies and is moved into position on tracks that are embedded in the floor of the

* Unless otherwise indicated, all references are to pages of the Joint Appendix.

airplane (401a-404a). There are locking devices on these buffets and the track system and it is undisputed that the buffets, the tracks, the locking devices and associated gear was owned and supplied by United (366a-367a). It was Dobbs' job to fill one of these interchangeable buffets with their food and to bring it aboard the plane and remove the old buffet (297a-299a).

Demands to admit relating to the operation and workings of the buffet and its locking system were served pursuant to Rule 36 of the Federal Rules of Civil Procedure, and United, the owner and supplier of this equipment, admitted to the truth of the following (366a-368a):

1. That at the bottom on either side of the cold food buffet there was a lever.
2. That in order to remove the old cold food buffet from its stowed position, it would be necessary to unlock the same by raising each of those levers.
3. That with the lever in that up position, a new cold food buffet cannot be pushed into position on the tracks.
4. That it was necessary for the levers to be returned to a down position in order for a new cold food buffet to be pushed into position on the tracks.
5. That when the levers are put in the down position and the cold food buffet is then pushed into place on the tracks, the buffet is automatically locked into place by some locking device on the airplane.
6. That prior to April 23, 1972 United never issued any written advices or instructions to Dobbs that the said levers were to be manually depressed after the cold food buffet was placed into position.

Plaintiff's claim that the unidentified Dobbs' employees failed to manually depress the levers after they pushed the buffet into position is thus contrary to the admitted manner in which these devices operated.

It is to be further noted that the contract between United and Dobbs was placed into evidence (613a-617a) and nowhere in that contract is Dobbs required to lock the buffets, depress the levers, or inspect to see that the buffets are in fact locked before leaving the plane. Indeed, it was the plaintiff as stewardess who had the responsibility of checking the buffets before take-off pursuant to United's own regulations for their stewardesses (215a-216a; 555a-556a).

Plaintiff, who admitted to a familiarity with the buffets and the levers (246a-249a), was the only known eye witness to the actual loading of the buffet in question. She admitted actually observing the same being loaded from a vantage point just two or three feet away (208a) and she admitted that it was loaded normally and properly and put fully into position (212a, 214a-215a). *She did not testify that she saw the loading men fail to manually depress the levers.*

After the buffet is loaded aboard the airplane, a stewardess is required to open that buffet and to check the quantity and nature of the contents as against the order placed. Plaintiff admitted that on this occasion she performed that job (213a) and that after the loading men had left the plane she physically opened each of the 4 doors of the buffet and checked the contents therein (213a-214a). In order for her to check the contents of each of the bottom two sections of the buffet, she had to bend down and remove each of the doors and at that time her face would have been approximately 12 inches away from the respective locking levers on each side (213a, 246a-249a, 609a-611a). *She admitted that she did not see the locking levers at that time to be in an up or unlocked position* (247a).

When the airplane leveled out after take-off plaintiff testified that she then observed the buffet to have slid aft about 2 feet and she then made various efforts to push it back into place, initially on her own and later with assistance (222a-230a). Those efforts by her will be discussed in greater detail *infra* under the issue relating to the "emergency doctrine" charge. She did claim that while making such effort she felt a twinge in her back. Neither of the two persons (one now in California and one in New York) who allegedly helped her to push the buffet back into place were called as witnesses on trial.

Plaintiff put into evidence the logs of the airplane (566a-603a) which contained no entry of any defect in the buffet or the locking system. She argues therefrom that because there is no such log entry, there was no defect in either the buffet or the locking system and that thus the sliding out of the buffet during take-off had to be due to the failure of the loading men to manually depress the locking levers. In response to that type of argument, it should be noted that the same logs do not even contain an entry indicating that plaintiff was injured or that anything was amiss (566a-603a). In adidtion, United's regulations (612a) require the stewardess to report to United's ramp serviceman on landing that a buffet had come loose. Plaintiff admits that she made no such report (230a), but nonetheless seeks to argue that the absence of such reports is supportive of her position.

The cold food buffet that was taken on in Atlanta would have been discharged in New York and could thereafter have been repaired or used on any United plane whatsoever with no record or notification as these are all interchangeable units (281a). If that buffet were found to have had a defect in the latching mechanism contained on its underside, there would be no record to in any way identify it as having been the one on this flight (281a).

Notwithstanding the judicial admissions by United that the locking levers function automatically and do not have to be manually depressed, plaintiff did offer some deposition testimony from a United employee to the effect that the levers are to be manually depressed (351a). There was, however, testimony from two employees of Dobbs corroborating United's judicial admissions that the locking levers are supposed to work automatically (374a, 403a-404a). And, in any event, plaintiff who both observed the actual loading of the cold food buffet and then inspected the contents of the same and had her eyes within 12 inches of the locking levers, did not testify that she saw those levers to have been left in the up or unlocked position (247a).

Although the medical testimony will be discussed in greater detail *infra*, it perhaps should be noted at this point that plaintiff's own medical expert, Dr. Koven, admitted that it is "medically conceivable" but not foreseeable that a pushing episode will cause a herniated disc (75a-76a).

(b) *On the issue of medical causation.* What, if any, injury did plaintiff prove to have resulted from this alleged incident of April 23, 1972? She admitted that notwithstanding United's regulations, she did not report to its medical department upon conclusion of the flight in question that she had sustained any injury (198a). Indeed, she admitted that she also worked on April 24 and April 25, 1972 and did not report any injury on those days either (198a). It was only after she finished work on April 26, 1972 that she claims to have reported this incident and an injury to Dr. Manfredi of United's medical department (199a). *However, Dr. Manfredi was not called as a witness on trial.*

Plaintiff testified that a few days later she went to see a Dr. Estrada in New Milford, Connecticut who treated

her and discharged her for return to work in 4 months time. *However, Dr. Estrada was not called as a witness on trial.*

In order for the plaintiff to return to work for United she had to pass a physical examination and on July 27, 1972 she was examined at United's request by Dr. Kapland (92a). *He, too, was not called as a witness by the plaintiff.* He was, however, called as a witness by Dobbs and we will discuss his testimony shortly.

In addition to the examination by Dr. Kapland, plaintiff had to be examined by United's own medical department before being allowed to return to work and that examination was conducted on September 8, 1972 (102a, 604a-605a). *Plaintiff did not call the doctor who performed that examination as a witness.* Dobbs, however, put the report of such examination into evidence (604a-605a) and it will be discussed shortly.

Plaintiff testified that she returned to work as a stewardess in September, 1972 and continued working until the end of November or early December, 1972 with no medical treatment during that period of time (152a). In December of 1972 she saw a Dr. Graubard (152a); in January of 1973 she saw a Dr. Lenemin (153a); in February, 1973 she saw a Dr. Gibe (155a); she then saw a Dr. Baker (156a); she saw a Dr. Harris (157a); and on May 5, 1973 she saw Dr. Kotang who placed her in the Genessee Hospital on May 15, 1973 and performed a laminectomy (158a). *None of these doctors were called as witnesses on trial.*

Remarkably, plaintiff's medical proof consisted solely of the records of the Genessee Hospital (518a-547a) and of testimony from a Dr. Koven who saw her on one occasion on December 14, 1976 at the request of her attorneys (53a-54a).

Do the hospital records show that the laminectomy performed on May 18, 1973 for a slipped disc was the result of a pushing incident such as plaintiff has claimed? *They do not!* The only accident history contained in the records of the Genessee Hospital indicates that the disc problem was caused by an episode of *"hyperextension"* (519a). *Hyperextension* is a backward bending of the back and is precisely the opposite kind of motion that one would be performing while pushing, according not only to Dr. Kapland (103a-104a) but also to Dr. Koven (69a). Indeed, Dr. Koven, plaintiff's own medical witness, admitted on cross examination that the *hyperextension* injury recorded in the hospital record is not the same as the accident mechanics claimed by plaintiff, and he admitted that the hospital record is thus at variance with the hospital history given to him by plaintiff (70a). Dr. Koven admitted further that a herniated disc could be caused by some innocuous incident that may have occurred after April 23, 1972 and about which we were told nothing (78a).

While the hospital records do show that plaintiff had a laminectomy performed on May 18, 1973 for a slipped disc, they do not establish that the same was caused by the alleged incident of April 23, 1972, and, indeed, tend to negate the same. Where, then, is plaintiff's proof of medical causation? The only medical proof other than the hospital records offered by plaintiff was from Dr. Koven who saw her solely for examination at the request of her attorneys on December 14, 1976 (53a-54a), more than four years after the alleged incident of April 23, 1972, and more than three years after the laminectomy of May 18, 1973.

Notwithstanding his own admission that a disc problem could have been created by any innocuous experience after April 23, 1972, and notwithstanding his admission that the

accident history in the hospital record was inconsistent with that given by plaintiff, Dr. Koven was allowed to testify on direct examination and over objection that the disc problem for which the laminectomy was performed on May 18, 1973 was caused by the alleged incident of April 23, 1972 (37a-38a).

Further, and of critical importance, is the fact that although Dr. Koven saw this plaintiff solely for the purpose of enabling himself to come to Court and testify, he was permitted over strenuous objection to testify to what she told him other doctors had diagnosed her condition as (22a-24a; 27a-28a). This lawyer-selected examining physician was allowed to testify that she told him that a doctor in Connecticut told her she had a back sprain in April, 1972 (23a); and that she told him that Drs. Graubard, Lenemin and Harris had thereafter informed her that she had sustained a slipped disc (24a, 27a, 28a). Thus, plaintiff's attorney was allowed to put into evidence and to place before the jury the double hearsay or opinion testimony contained in Dr. Koven's testimony of what the plaintiff told him the opinions of four other doctors were, none of who were called to Court. This is highly critical because Dr. Koven testified that his conclusions were based on that information so supplied by the plaintiff (37a, 65a); and it was the only evidence in this case attributing the laminectomy and slipped disc to the incident of April 23, 1972.

On cross examination Dr. Koven admitted that his opinion was dependent upon the reliability of the information given to him by plaintiff (65a). That information proved to be less than reliable in several important areas which defendant was able to document. Thus, although plaintiff complained to him on December 14, 1976 of losing much time from work, he admitted that her documented work

history contradicted what she claimed (64a-65a). In this respect the proof showed that for the years 1976 and 1975 plaintiff had received commendations from United for never missing a day from work and never being late for a single flight (606a-607a). In addition, plaintiff admitted on trial that she lost no time from work in 1974 that she attributed to this incident (197a).

Dr. Koven further admitted that plaintiff did not inform him that Dr. Kapland found nothing wrong with her at the time of his examination in July of 1972 and that United's own medical department made similar findings in September of 1972 (61a). And, although plaintiff denied to Dr. Koven that she had had any subsequent back injury, he learned on trial that such denial was false as she had slipped and fallen on her back in February of 1974 (57a).

Dr. Kapland examined the plaintiff at the request of United on July 27, 1972 (92a), and he was called as a witness by Dobbs. He testified that she at that time had no underlying pathology, no restriction of motion, and that she did not have a slipped or herniated disc (93a-99a). The results of his intensive examination were completely negative, and with a herniated disc even in remission a completely negative examination will not be had (99a, 118a-121a). Something could have disabled her later on, but that does not mean that anything that occurred prior to the date of his examination could have been the cause of such later disability (121a).

Dr. Kapland further testified that the hospital records showing an injury due to an episode of *hyperextension* relates to something other than the pushing incident she describes (104a).

Also put into evidence by Dobbs was the report of physical examination given to plaintiff by United's own medical

department on September 8, 1972 preliminary to her returning to work (604a-605a). As that exhibit indicates, she had no complaints whatsoever at that time referable to her back, the spine or legs and she certified that she was in good health (604a-605a). The examination by United was also completely negative and she was found able to perform her job duties (604a-605a). Such examination and findings by United's medical department on September 8, 1972 are completely consistent with the examination and findings made by Dr. Kapland on July 27, 1972 (103a).

This evidence from Dr. Kapland and the report of United's examination signed by plaintiff herself only serves to highlight the extreme prejudice to Dobbs of the compounded hearsay that the Court allowed Dr. Koven to testify to.

(c) *With regard to the propriety of charging the "emergency doctrine".* Plaintiff had observed that it took two grown men to push the buffet into position when it was loaded (14a). However, she elected to try to push it ba[illegible] into place by herself when she saw that it had slid ba[illegible] after take-off (223a). Another stewardess was close by and she or others could have been called for assistance, but plaintiff did not seek assistance (222a-223a).

Her first effort did not budge the buffet, but did produce a twinge in her back (225a). Undaunted, and still not seeking assistance, she then put one of her feet up against the aft buffet to get greater leverage and made a second effort to push the buffet into place (225a). Only after that failed did she ask the other stewardess (Pat Harrer) for help (227a). When Miss Harrer suggested that they obtain the assistance of the male flight engineer, the plaintiff vetoed that suggestion (227a). The two girls, pushing together, could not move the buffet (228a), and finally plaintiff did call the male flight engineer and the three of them pushing

together were able to move it back into place (230a). It should be noted parenthetically that neither the other stewardess nor the flight engineer, the former being in California and the latter being in New York at the time of trial were deposed or called to testify upon trial (145a) to corroborate this alleged incident.

In considering the issue of plaintiff's contributory negligence in attempting to push this buffet into place without assistance and in continuing these efforts even after feeling some twinge in her back, the Court charged the jury on the "emergency doctrine" (496a). However, we respectfully submit that the record is devoid of any proof that there was any emergency taking place.

The only witness to testify about the flight was the plaintiff herself. She admitted that the flight was normal and without problems (218a-219a, 230a). At the time of the alleged incident, the plane was operating in normal and usual fashion (222a-223a).

The professed basis for the "emergency doctrine" charge was that the buffet after sliding out, partially blocked a door *which would have been used if an emergency had thereafter developed* (137a). However, there was no proof of an emergency either at the time of the pushing, or thereafter, which required the plaintiff to push the buffet without assistance or to veto the suggestion of the other stewardess that the flight engineer be called.

(d) *With regard to the excessiveness of the verdict.* Plaintiff submitted no proof and made no claim for either future loss of earnings or past or future medical expenses (472a, 491a) and the jury was not charged that there could be any recovery for any such items (493a-502a).

The only special damages claimed by plaintiff were for the alleged period of disability from April 26, 1972 until

late September, 1972 (a period of approximately 5 months) and from December, 1972 to September, 1973 (a period of approximately 9 months) (151a, 152a). She admittedly lost no time from work attributable to the incident in the years 1974, 1975 or 1976 (192a-197a). Indeed, as we indicated above, for the years 1975 and 1976 she received commendations from United for never having missed a day's work for any reason and for never having been late on a single occasion (606a-607a); and she even worked overtime in those years (197a).

Although plaintiff admitted to possessing her tax returns for the years 1972 through 1976 (195a), and although she was directed by the Court to produce those returns (196a), she only did produce a copy of her tax returns for the years 1971 and 1972 (390a). In 1971, the year before the alleged incident, she earned $6,982.55 (390a). In 1972, the year of the alleged incident and during which she claims to have lost approximately 5 months from work, she earned $6,411.49 (391a), almost as much. On that basis, the maximum special damages for 14 months of disability would not exceed $10,000 which was the amount claimed by her attorney in his summation. On the basis of those limited special damages and her documented splendid work record in the years following the laminectomy, we submit the award of $170,000 is excessive.

(e) *Dismissal of indemnity or contribution to Dobbs against United was against the weight of the evidence.* As previously indicated, United owned, operated and maintained the buffet, the tracks, and the locking and latching mechanism for the same (273a-274a, 366a-368a). In answer to demands to admit pursuant to Rule 36 of the Federal Rules of Civil Procedure, United admitted that the locking levers had to be in a down position in order for the cold food buffet to be pushed into place on the tracks; and that

when the levers are in the down position and the buffet is then pushed into place on the tracks, it is then *automatically* locked into place by some locking device on the airplane (366a-368a).

The undisputed proof by plaintiff was that the unidentified employees of Dobbs did in fact push the buffet completely into place (212a-215a).

In view of that undisputed testimony, and in view of the judicial admissions by United, and with the testimony by Bridges and Malloch corroborating that the buffet should have automatically locked into place (374a, 403a-404a), the weight of the evidence would clearly indicate that if it slid out of place during take-off it had to be because of some malfunction in the locking or latching mechanism. For such a malfunction in this equipment, United should be liable.

The Applicable Law

At the behest of plaintiff's attorney, Judge Weinstein ruled that the law applicable hereto is the law of Georgia (257a-262a).

POINT I

A *Prima Facie* Case of Actionable Negligence on the Part of Dobbs Was Not Established.

"Actionable negligence" under Georgia law is a breach or non-performance of a legal duty, through negligence or carelessness, which breach or non-performance results in damage or injury to another, *Ferrell* v. *Haas*, 136 Ga. App. 274; *Montega Corp.* v. *Grooms*, 128 Ga. App. 333; *Slaughter* v. *Slaughter*, 122 Ga. App. 374; and *Porch* v. *Wright*, 116 Ga. App. 21. A defendant is not an insurer against injury, *Northern Freight Lines Inc.* v. *Southern Ry Co.*, 108 Ga.

App. 189; and in the absence of a breach of duty owed to the plaintiff there can be no liability in negligence, *Underwood* v. *Atlantic and W.P.R. Co.*, 105 Ga. App. 340, aff'd. in part, rev'd. in part, 218 Ga. 193. None of the *ultimate probanda* required for a prima facie case of "actionable negligence" under Georgia law have been established by this plaintiff.

(a) *Plaintiff failed to prove that she was owed a duty by Dobbs.* Distilled to its essence, the plaintiff's claim is predicated upon the alleged failure of Dobbs to manually depress the locking levers after delivering the cold food buffet to the plane. However, there was no proof that Dobbs owed plaintiff the duty to do so.

Dobbs was an airline caterer hired to deliver food to airplanes by United in accordance with a written contract (613a-617a). Nothing in that contract in any way imposes a duty upon Dobbs to either lock the cold food buffet into place, or to see to it that they are locked into place. Indeed, as earlier indicated, the duty to check the buffet prior to take-off is imposed by United upon its own stewardess (555a-556a).

Not only is the existence of any such duty not to be found in the contract pursuant to which Dobbs was working, but it is negated by the judicial admissions made by United to Dobbs' demands to admit pursuant to Rule 36 of the Federal Rules of Civil Procedure (366a-368a). For in those binding judicial admissions, United admitted that in order to push the buffet into place the lever must be in the down position; and that once the buffet is pushed into place it is *automatically* locked therein (367a-368a). United further admitted that it never issued any written instructions or advices to Dobbs that Dobbs had to manually depress the levers after the cold food buffet was placed into position (368a). Each of those matters is "conclusively

established" for this lawsuit, Rule 36(b) of the *Federal Rules of Civil Procedure.*

Since United, for whom Dobbs was doing the work, admitted that it was neither necessary nor required for Dobbs to manually depress the levers after pushing the buffet into position, how can it be said that Dobbs had any such duty? There was a complete failure of proof on the part of the plaintiff to show that Dobbs owed her the duty of doing that which she says they failed to do.

Even if the levers were in the up or unlocked position before take-off, under Georgia law Dobbs could not be liable to the plaintiff for the same (even assuming that it had an obligation to depress them). For, plaintiff is chargeable under Georgia law with seeing that which she could have seen had she looked, *Herschel McDaniel Funeral Home, Inc.* v. *Hines,* 124 Ga. App. 47, *Rich's Inc.* v. *Waters,* 129 Ga. App. 305; and Dobbs would be under no duty to warn her of those conditions that she knew or should have known of by using her senses, *Roberts* v. *Bradley,* 114 Ga. App. 262. In this connection it is to be remembered that plaintiff admitted to observing the entire delivery procedure and thereafter had each of the levers within inches of her eyes when inventorying the contents of the buffet, and on neither occasion did she see the levers to be in the up position. If they were in the down position at that time, then there can be no claim against Dobbs for failing to leave them in the down position. If they were in the up position at that time, then she should have observed them and Dobbs cannot be said to have breached any duty to her.

(b) *There was no proof of a breach of duty on the part of Dobbs.* Even assuming *arguendo* that Dobbs owed a duty to plaintiff to manually depress the levers, there was simply no proof whatsoever that it failed to do so.

Plaintiff admitted to having observed Dobbs make the food delivery and push the cold food buffet into place. *However, this only witness to that work did not testify that she saw them fail to depress the levers.* Further, after Dobbs delivered the food and left the plane, plaintiff herself had to open each of the four doors of the buffet to take inventory of the contents and was at that time within inches of each of the levers. *Again, there was a complete absence of testimony from her that the levers were not depressed.*

Plaintiff's entire case rests on the *assumption* that merely because the buffet slid two feet out of place during take-off, that meant that Dobbs had not manually depressed the levers. That assumption contains all the logical fallacies of *"post hac ergo propter hac"* and is not a permissible basis for recovery under Georgia law. For, Georgia follows the "equal inference" rule and imposes upon a plaintiff the burden to prove that the cause of the alleged accident was some negligent act of the defendant. Mere assumption or conjecture is legally inadequate, *Lewis* v. *Drake*, 116 Ga. App. 581.

Where, as here, plaintiff proves merely that an incident occurred and the proof permits two equally plausible inferences to be drawn as to the cause of the incident, one of which such inferences might be a negligent act of the defendant and the other of which does not involve any negligent act of the defendant, then the plaintiff has failed to establish a prima facie showing of negligence, *Lewis* v. *Drake, supra.* The mere fact that after take-off the buffet was found to have slid back approximately two feet gives rise to at least two inferences for the cause of the same. Perhaps the levers were not manually depressed (assuming that such was required for this equipment) or perhaps the locking and latching mechanism was in some way defective. Plaintiff's proof does not in any

way show the former to be the case and there is a consequent failure of proof.

Plaintiff seems to urge that the plane's logs contained no entry of a defective locking or latching mechanism, and she contends that that therefore excludes such a possibility. However, the fact that there was no record made of any such defect is due to plaintiff's own admitted failure to report the incident on landing to United's ramp serviceman as she was required to do under United's regulations (230a, 612a). And, of course, will plaintiff concede that the absence of any notation in the logs about an accident having happened to her proves that there was no such accident?

(c) *Plaintiff's own proof showed her injury not to be foreseeable.* It has been stated that foreseeability is "talismanic" in determining whether there has been a tortious breach of duty under Georgia law, *Williams* v. *United States,* 352 F.2d 477. For there to be "actionable negligence", the alleged negligent act must produce probable and foreseeable consequences, *Davis* v. *Aiken,* 111 Ga. App. 505. Liability in negligence is not foreseeing and guarding against that which is *probable and likely* to happen, not against that which is only remotely and slightly possible *Eckard-Walton Inc.* v. *Adams,* 126 Ga. App. 210. The unusual or unlikely consequence is not within the ambit of one's duty in negligence, *Feldman* v. *Whipkeys Drug Shop,* 121 Ga. App. 580. An event is "not reasonably foreseeable" if it is an extraordinary coincidence, or is unusual and unlikely, or is a rare event, or where other and contingent experiences preponderate largely in causing the injurious event, *Standard Oil* v. *Harris,* 120 Ga. App. 768. Against this legal backdrop, let us examine the record for plaintiff's proof on the talismanic issue of foreseeability.

Although knowing that it took two grown men to push the buffet into place, plaintiff initially attempted to do so on her own without assistance. She continued in that solo effort even though she felt a twinge of pain in her back. Her pushing is claimed to have caused a slipped disc requiring a laminectomy. On cross examination, plaintiff's own medical witness, Dr. Koven, admitted that although it was "medically conceivable" for a pushing episode to bring about a slipped disc it was not foreseeable. As that is the only proof in the record on this issue, we respectfully submit that here too plaintiff has had a failure of proof on a key issue.

It is is not legally foreseeable that "for want of a nail a kingdom will be lost." The responsibility of a Court is to draw the parameters for which a person's act can result in a legal liability. The Georgia courts have not established the parameters so as to render liable a person whose act or omission makes it subsequently necessary for some other person to push an object. If a person were to be liable every time some act of his caused another to push or pull, or do anything else, there would be no limit to the extent to which the ambit of liability would extend. This was recently discussed by the New York Court of Appeals in *Pulka* v. *Edelman,* 40 NY2d 781, 390 N.Y.S.2d 393, wherein the Court stated:

> "If a rule of law were established so that liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow. The liability potential would be all but limitless and the outside boundaries of that liability, both in respect to space and the extent of care to be exercised, particularly in the absence of control, would be difficult of definition."

If the buffet in sliding out of place had struck a person, that would be a natural and foreseeable consequence. But that did not occur in the instant case. What did occur is that after the buffet had come to rest without injuring anyone, plaintiff sought to push it back into place on her own and claims to have injured herself in so doing. Any such injury would be beyond the boundaries of defendant's duty. As stated by Judge Cardozo in *Palsgraf* v. *Long Island R. R. Co.*, 248 N.Y. 339, 334:

> "The risk reasonably to be preceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

The parameters of the issue of foreseeability as fixed by the Georgia courts are illustrated in *Pegg* v. *Knights Inc.*, 112 Ga. App. 437. The defendant in that case rented a boat to a 19 year old boy. Defendant knew that the boat leaked and had a wet and slippery bottom, but did not advise the boy. That slippery condition caused the boy to slip and fall over the boat's side where he became entangled in lines and debris and drowned. In holding that defendant was not liable for this result as it was not foreseeable, the Court stated:

> "We can see no basis of foreseeability to be charged to the defendant that the young man might have fallen out of the boat and drowned in this manner, and defendant's liability is limited to those consequences which it should have reasonably anticipated as the natural or probable consequence of its own act or omissions."

The claimed development of a slipped disc in the instant case is similarly a result not reasonably to be anticipated as plaintiff's own medical expert seemed to agree.

(d) *Proximate cause.* Somewhat allied to the requirement of foreseeability is the requirement that the tortious act complained of be the proximate cause of the damages. This requirement is codified in Ga. Code Ann. §105-2008:

> "If the damages are only the imaginary or possible result of the tortious act, or other contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer."

and in §105-2009:

> "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered; but damages traceable to the act, but not its legal or natural consequence, are too remote and contingent."

Where, as here, the injury could not reasonably be expected to result from defendant's act, or would not have resulted therefrom but for the interposition of some independent cause, the act of defendant would not be a proximate cause of the injury, *Davis* v. *City of Tocca,* 93 Ga. App. 155. A result produced because of independent and unforeseen causes may not be said to have proximately resulted from the act of defendant, *Amhurst* v. *Cox Broadcasting Corp.,* 117 Ga. App. 381.

In *Standard Oil Co.* v *Harris,* 120 Ga. App. 768, the Court held that a cause which is merely incidental is not to be considered as a proximate and responsible one. If there was a slipped disc that resulted from plaintiff's pushing, any alleged negligent act on the part of Dobbs would have been purely incidental and is not to be considered as the proximate cause. It would have been, in effect, a "condition" rather than a "cause." The distinction between a "cause" and a "condition" was only recently explained by

the New York Court of Appeals in *Sheehan* v. *City of New York,* 40 N.Y. 2d 496, 387 N.Y.S. 2d 92. As in that cited case, under the plaintiff's own testimony as to what occurred, any act of Dobbs "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes."

If we carelessly drop a pencil and someone else in the course of picking it up sustains a slipped disc, are we legally liable for such injury? We think that question answers itself, and it is the bedrock issue in this case. No prima facie case of actionable negligence was established, and this action should not have been allowed to go to the jury.

(e) *Medical causation.* Plaintiff claims that the slipped disc for which a laminectomy was performed on May 18, 1973 was caused by the pushing incident of April 23, 1972. However, plaintiff called none of the doctors who saw and treated her at any time in this matter and her medical case consisted of the records of the Genessee Hospital where the laminectomy was performed and of a Dr. Koven, a physician selected by her lawyer who examined her in December of 1976 so that he could testify in Court.

The hospital records do not show that the laminectomy and slipped disc came from the pushing episode that she claims. The history in that hospital record (519a) relates the slipped disc to an episode of "hyperextension" which is quite different from pushing according both to Dr. Kapland and plaintiff's own Dr. Koven (69a-70a, 103a-104a). Thus, the only possible source for proof of medical causation would have to be from Dr. Koven; and we submit that such proof is not to be found in his testimony either.

Dr. Koven who saw the plaintiff on one occasion on December 14, 1976 (more than 4 years after the alleged

incident of April 23, 1972 and more than 3 years after the laminectomy of May 18, 1973) was permitted over objection to testify that the plaintiff had informed him that various other doctors (who were not called to Court) had told her that she sustained a slipped disc, and on the basis of that improperly admitted hearsay testimony he was permitted to give his opinion that the laminectomy and the slipped disc stemmed from the alleged incident of April 23, 1972, notwithstanding his admission that the hospital record shows a different kind of history and that a slipped disc could be caused by any innocuous incident. We will be discussing under Point II, *infra*, the impropriety of permitting that testimony from Dr. Koven and hence we will not dwell upon the same at length hereat. Suffice it to say, that if such testimony is stricken, the record is then completely devoid of any proof of medical causation herein.

POINT II

It Was Error to Allow Dr. Koven to Testify as to What the Plaintiff Had Told Him Various Other Doctors Had Told Her, and to Then Base His Opinion on That Improperly Admitted Evidence.

Rule 802 of the Federal Rules of Evidence declares hearsay inadmissible unless expressly allowed by those Rules. Under Rule 801 of the Federal Rules of Evidence a "statement" is an oral assertion; and a "declarant" is a person who makes such an oral assertion. Hearsay itself is thus defined in Rule 801(c) as an oral assertion made by a person other than while testifying upon trial. Clearly, what the plaintiff told Dr. Koven in his office on December 14, 1976 is hearsay within the meaning of this Rule. In addition, what plaintiff said to Dr. Koven was told to her by other doctors years prior was also hearsay within

the meaning of this Rule. As neither the hearsay statement made by plaintiff to Dr. Koven nor the hearsay of what she said other doctors had told her comes within any exception to the Rules of Evidence, that testimony should not have been allowed. It was terribly prejudicial to allow Dr. Koven to testify that the plaintiff had told him that other doctors had told her that she had sustained a slipped disc as a result of the alleged incident of April 22, 1972.

Obviously a written report from a doctor would be more reliable evidence than an oral statement attributable to that doctor. Yet, we know that a plaintiff may not even prove her own case by introducing into evidence written reports made by doctors of her own choosing who are not called as witnesses. In *Yates* v. *Bair Transport Inc.*, 249 F. Supp. 681, 691, Judge Tenney stated:

> "No case, however, has been found or cited wherein a plaintiff was permitted to introduce self-serving reports made by doctors of his own choosing, in anticipation of the litigation, to shore up his own case."

Since plaintiff herself could not testify as to what doctors had told her, it was improper to allow Dr. Koven to testify as to what the plaintiff had told him other doctors had told her. For, as succinctly stated by Judge Learned Hand in *United States* v. *Grayson*, 166 F. 2d 863, 869:

> "'Multiple hearsay' is no more competent now than single hearsay was before."

And, as stated in *Felice* v. *Long Island Railroad Company*, 426 F. 2d 192, 197:

> "There would seem to be no sensible basis for receiving an entry by a doctor or nurse concerning what

> a patient had said regarding the causes of an accident unless a live witness—the patient, the entrant or a bystander—would have been allowed to testify to the statement."

In other words, a plaintiff may not introduce inadmissible hearsay by compounding the same and having some other witness testify as to what the plaintiff had said others had told her. One may not have a witness testify as to what another had told him that even others had said, *Pinkard* v. *United States*, 240 F. 2d 632.

A treating doctor's need for information in order to accurately diagnose and treat may permit such a treating physician to testify to accident history and complaints made to him by his patient. But even that exception is inapplicable to ex parte communications prepared outside the presence of a treating physician for use as testimony, *Foster* v. *Crawford Shipping Co. Ltd.*, 496 F. 2d 788. In other words, even if Dr. Koven were the treating physician, he would be allowed to testify as to information he received from the plaintiff regarding accident history and complaints, but he would not be allowed to testify as to what the plaintiff told him about ex parte communications from other physicians outside his presence.

It is important to bear in mind that Dr. Koven was not a treating physician. He was a lawyer-selected doctor for the sole function of testifying. It was error and highly prejudicial to allow him to base an opinion on the hearsay opinions of other doctors who were neither qualified as experts nor present at the trial, *Taylor* v. *B. Heller & Company*, 364 F. 2d 608. Indeed, the testimony allowed from Dr. Koven:

> "* * * clearly contravened the rule that expert opinion may not be based upon the opinion of others, either

in evidence or not in evidence." *Taylor* v. *B. Heller & Company, supra.*

The same rule applies in Georgia, see *Stancill* v. *McKenzie Tank Lines Inc.*, 497 F. 2d 529, 536, and the decisions cited therein.

If we eliminate the improperly received testimony from Dr. Koven, then there is no evidence whatsoever in this record that causally relates the slipped disc and laminectomy to the alleged incident of April 23, 1972. Without such proof of causation there can be no liability and plaintiff's action should be dismissed, *Lagsdon* v. *Baker*, 517 F. 2d 174.

And, in view of the "hyperextension" history contained in the hospital record, the examination conducted by Dr. Kapland on July 27, 1972 finding plaintiff not to have a slipped disc, the findings by United's medical department on September 8, 1972 that plaintiff was without back problems and could return to work, plaintiff's own certification on September 8, 1972 that she was in good health and had no problems, and the admission by Dr. Koven that any innocuous event could cause a slipped disc, it was against the overwhelming weight of the credible evidence for the jury to find that the laminectomy for a slipped disc was causally related to the alleged incident of April 23, 1972.

POINT III

It Was Error for the Emergency Doctrine to Be Charged.

Defendant contended that the plaintiff herself was contributorily negligent in that she had observed and inspected the loading procedure done by two grown men, that she attempted to push the buffet back without seeking assis-

tance, that she persisted in attempting to push the buffet back without assistance even after feeling some pain in her back, she vetoed the suggestion of another stewardess that the male flight engineer be called, and that she continued making efforts to push the buffet into place.

In their consideration of the plaintiff's own conduct, the jury was charged the "emergency doctrine" by the Court and was told that they could consider and evaluate her actions against the lesser standard that applies to those acting suddenly in a time of danger (496a).

However, there was no factual proof whatsoever that there was any emergency or danger existing at the time of this pushing episode, or that any thereafter eventuated. The undisputed and uncontradicted testimony of plaintiff herself was that this was a normal flight with no problems (218a-219a, 222a-223a). In the absence of any proof that such an emergency or danger did exist that required plaintiff to act as she did, it was error to charge the "emergency doctrine", *Estes* v. *Town of Big Flats, Sheming County*, 41 A.D. 2d 681, 340 N.Y.S. 2d 950.

POINT IV

The Damage Award of $170,000 Was Excessive and Not Supported by Proof in the Record.

As we have indicated on Page 15 of this brief, *supra*, plaintiff's special damages are limited to not more than $10,000 for a claimed 14 months of work disability in 1972 and 1973. Following her return to work at the end of 1973, she did not lose a single day for any reason related to her back. Indeed, the documentary proof shows that in 1975 and 1976 she received commendations from her employer for never having missed a day's work and never having been late (606a-607a). In that connection it is to be remem-

bered that she was working as a stewardess pushing the carts and trays.

There was no claim made for future loss of earnings as she had obviously had an excellent result from the laminectomy judging by the objective facts.

There was no proof or claim made for any past or future medical expenses.

We believe that on this record a damage award of $170,000 was excessive.

In *Ferrari v. Moore-McCormack Lines, Inc.*, 294 F. Supp. 1336 (1969) Judge Weinfeld had to consider the propriety of an award of $175,000 for an injury of similar nature but of much greater consequences. In the cited case, the plaintiff seaman was a hospital in-patient for 5 months, had a laminectomy and bone graft performed, wore a steel brace for about a year and a half, was certified as not fit for duty, proved past loss of earnings of $20,000, and proved a future loss of earnings of $60,000.

In setting aside the $175,000 verdict in that case, Judge Weinfeld stated:

> "This Court has great reluctance to interfere with a jury's judgment, but the total amount is so excessive and so far beyond fair and reasonable compensation for damages sustained that to permit it to stand would be a denial of justice. Cf. Dagnello v. Long Island R.R., 289 F. 2d 797, 806 (2d Cir. 1961). We may have inflation, but this is inflation run riot. The Court is of the view that a remittitur is not warranted; it will not serve the interests of justice. The verdict with respect to the second cause of action based upon the accident of March 4, 1966 is set aside in its entirety and a new trial ordered as to all issues."

Since the plaintiff in the case at bar was certified to work and did in fact compile a splendid work record after the operation, and since she had a smaller claim for past loss of earnings and no claim whatsover for future loss of earnings, it would seem that the instant verdict of $170,000 is even more shocking than the one received by Judge Weinfeld and should be set aside. Indeed, the interest on such sum alone would constitute a doubling of her salary without any impairment of principal. Or, she can retire on this interest with no loss of income, notwithstanding that she has a full work potential and has claimed no future loss of earnings. This is indeed an excessive recovery on this record.

POINT V

The Verdict in Favor of United and Against Dobbs Was Contrary to the Weight of the Evidence.

United made admissions to Requests for Admission served by Dobbs pursuant to Rule 36 of the Federal Rules of Civil Procedure (366a-368a). These matters so admitted, according to Section (b) of Rule 36, are *"conclusively established"*.

Among the things so "conclusively established" were that United owned the cold food buffet; that United owned the tracks on the airplane on which the buffet operated; that United owned the locking devices on the said tracks; that in order to push the cold food buffet into position on the tracks the lever on either side must be in a down position; and that when the buffet is pushed into place on the tracks it then *automatically* locks into place by some locking device on the airplane (366a-368a). United also admitted that such equipment was maintained by it (273a-274a).

The uncontradicted proof on trial was that the cold food buffet had been pushed fully into place (212a-215a).

Accordingly, by virtue of United's own admission which is conclusive, that buffet should have automatically locked into place and should not have come loose during take-off. The fact that plaintiff said it did come loose during take-off establishes that the automatic locking system was not functioning.

United, as the owner and supplier of that equipment, had the obligation to inspect, maintain and keep it in good repair. It was not the obligation of Dobbs. For such malfunction in this automatic locking system United has a liability for indemnity or contribution. As that liability is based on United's own admission, which conclusively establishes the matter, it was against the weight of the evidence for the jury to render a verdict in favor of United and against Dobbs.

Georgia law allows the impleader of a third party defendant for contribution or indemnity, *Ga. Code Ann.* 81 A-114; and it recognizes contribution amongst tortfeasors, Ga. Code Ann. 105-2012; *Southern Railway Company* v. *City of Rome,* 179 Ga. 449, and *Caudle* v. *Whiddon,* 126 Ga. App. 21.

Accordingly, we respectfully submit that a new trial should be had on Dobbs' claim against United for indemnity or contribution.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the judgment appealed from herein be reversed and that plaintiff's action be dismissed. Alternatively, a new trial is requested. A new trial on the third party action of Dobbs against United should be had if plaintiff's action is not dismissed.

Respectfully submitted,

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Defendant and Third Party Plaintiff-Appellant, Dobbs Houses, Inc.
801 Second Avenue
New York, N.Y. 10017

SIDNEY A. SCHWARTZ
JOSEPH ARTHUR COHEN
Of Counsel

BY
OFFICE
HAVENS

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